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Leading Comment*

IMPLIED WARRANTIES—THE PRIVACY RULE AND STRICT LIABILITY —THE NON-FOOD CASES

INTRODUCTION

The assault upon the citadel of privacy is proceeding in these days apace. . . . War correspondents with the beleaguering army are issuing daily bulletins proclaiming that the siege is all but over. From within the walls comes the cry, not so; we have but begun to fight. Watchman, what of the night?

Dean William Prosser,
June, 1960.¹

Of all the debatable subjects within the general field of tort law, few have proven more controversial than has the attempt to predicate liability for a defective commercial product upon an implied warranty basis. The conflict, more specifically, has centered around the extent to which that theory of recovery should be limited by requiring privity of contract between plaintiff and defendant. This, of course, is the same problem which for so long plagued the proponents of negligence liability. In that area the consumer's battle has largely been won.² In the implied warranty field on the other hand, the privity question has remained, as Prosser's query of the watchman indicates, in a state of vexing uncertainty. There had developed in several jurisdictions, it is true, a relaxation of the rule in cases involving deleterious food. But until very recently the law had failed to proceed beyond that point. Without such further progress it was difficult to predict what outlines might be ascribed to the area.

Within the last few years, however, several very important implied warranty cases have extended the attack upon privity to products of a purely mechanical nature. As might be expected, their impact upon the law of products liability has been significant. Their presence, moreover, has created problems seldom encountered when dealing with the relatively narrow food exception. It is these cases and problems with which this comment will be primarily concerned. Through a review of

*On occasion an article is submitted by a law review student which the editorial staff feels is deserving of special treatment in the *Missouri Law Review*. This comment is such an article.

1. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) (hereinafter cited as *The Assault*).

2. See 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5 (1960); 2 HARPER & JAMES, TORTS § 28.1 (1956); PROSSER, TORTS § 84 (2d ed. 1955); Annot., 74 A.L.R.2d 1111 (1960).

the decisions and a discussion of some of their more salient features, combined with some arguments and suggestions, it is hoped that a tentative outline may be formulated as a future guide in the area.

I. GENERAL BACKGROUND

Exactly how and when the privity rule came to be applied to actions for breach of implied warranty is a subject difficult of determination. Some writers have cited the well known case of *Winterbottom v. Wright*³ as the first decision upon the point, and indeed, a few later English courts may have accepted it as such.⁴ The opinion, however, makes no reference to the word "warranty" and very few of the earliest American decisions even mention the case,⁵ preferring to rely upon the more mechanical and perhaps questionable theory that treated any type of personal property warranty as a matter of contract.⁶ Since at that early date one who was not a party to a contract normally could not maintain an action for breach of it,⁷ then, so the courts reasoned, one who was not a party to the making of the warranty (the sale) could claim no breach thereof when the article proved defective. In practice this would bar not only one who had no contractual relationship as to the product at all, but further allowed a purchaser to sue only his immediate vendor. Behind the formula, of course, undoubtedly existed the same concern for growing industry which was indicated by Lord Arbinger in *Winterbottom*.⁸

3. 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842).

4. See *Longmeid v. Holliday*, 6 Exch. 761, 155 Eng. Rep. 752 (1851) (*semble*); *Thompson v. Lucas*, 17 W.R. 520 (1868).

5. *Boyd v. Whitfield*, 19 Ark. 447 (1858) (warranty of title to slaves); *Coolidge v. Burnes*, 25 Ark. 242 (1868) (warranty of fitness of slaves); *Bordwell v. Collie*, 45 N.Y. 494 (1871) (warranty of title to horse); *Zuckerman v. Soloman*, 73 Ill. 130 (1874) (defective machinery, attempted use of warranty for setoff purposes); *Berger v. Standard Oil Co.*, 126 Ky. 155, 103 S.W. 245 (1907) (unfit lubricating oil); *Welhausen v. Charles Parker Co.*, 83 Conn. 231, 76 Atl. 271 (1910) (defective shotgun).

6. This theory as to the nature of warranty obligations has been criticized, it being pointed out that an action for breach of an express warranty was in its inception an action on the case in the nature of deceit, and sounded distinctly in tort. See Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888). While this is true, it is also true that the later practice was to declare the action in assumpsit, thus bringing it within newly developing contractual principles, Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 120 (1943), and that the first implied warranty cases considered the remedy as contractual in nature, e.g., *Gardiner v. Gray*, 4 Camp. 144, 171 Eng. Rep. 46 (1815); *Randall v. Newson*, 2 Q.B.D. 102 (1877). Further confusing the matter is the fact that even after it became common to consider the warranty as contractual, it still remained possible to declare an action for breach thereof in tort. See *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 274 (1908) and cases cited therein. Thus it would appear that there is no exact answer as to the legal nature of a warranty obligation. A court may take either view and find ample support.

7. The English courts have never recognized the exception as to third party beneficiaries, and the American law on the subject did not begin its development until 1859. SIMPSON, *CONTRACTS* 300-01 (1954). Common law acceptance of assignments occurred only shortly before this time. *Id.* at 359.

8. *Winterbottom v. Wright*, *supra* note 3, at 114, 152 Eng. Rep. at 405.

Formidable as the privity rule was, however, it was not to be long until some courts, perhaps feeling that manufacturers were being accorded more protection than was necessary, began seeking ways to ameliorate the harshness of the doctrine. Concepts of agency,⁹ assignment,¹⁰ and the third party beneficiary¹¹ provided a starting point. Through the use of such theories courts often managed to circumvent the rule, although there existed no direct contractual relationship.¹² The application of such ideas led to some anomalous results,¹³ and could never prove satisfactory as a general matter, but did at least provide a means of allowing recovery in some cases. The same sort of approach in more modern form is to be seen in those decisions which have found an express warranty existing in an injured party's reliance upon untrue (but not necessarily fraudulent) advertising, even when privity was absent.¹⁴

A more functional approach to the problem was taken by those courts which simply dispensed with the rule itself. The assault, not surprisingly, began first in the field of food and beverages.¹⁵ A forthright abandonment of the privity requirement here was relatively easy, for the English law has always attached a more strict type of liability to sellers of food and drink than to others.¹⁶ Spreading slowly at first, the food exception has gained momentum in the last thirty years and is now probably followed by either a large minority or a small majority of American jurisdictions, although the exact total is disputed.¹⁷ The courts have not always been uniform in stating the basis for allowing recovery without privity, some hold-

9. See, e.g., *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A.2d 316 (1943); *Bowman v. Great Atl. & Pac. Tea Co.*, 284 App. Div. 663, 133 N.Y.S.2d 904 (1954); *Wisdom v. Morris Hardware*, 151 Wash. 86, 274 Pac. 1050 (1929).

10. For an exposition of this theory, see 1 WILLISTON, *SALES* § 243a (3d ed. 1948).

11. See *Dryden v. Continental Baking Co.*, 11 Cal. 2d 33, 77 P.2d 833 (1938); *Singer v. Zabelin*, 24 N.Y.S.2d 962 (New York City Ct. 1941); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928).

12. For more extensive compilations of the various theories by means of which courts have avoided the privity rule, see Gillam, *Products Liability in a Nutshell*, 37 *ORE. L. REV.* 119, 153-55 (1957); Annot., 75 *A.L.R.2d* 39, 61-70 (1961).

13. See for example, *Gearing v. Berkson*, 223 Mass. 257, 111 N.E. 785 (1916) (wife who purchases defective product acts as agent for her husband, and thus lacks the privity necessary to recover for her own injuries under an implied warranty), and *Brussels v. Grand Union Co.*, 14 N.J. Misc. 751, 187 Atl. 582 (1936) (child who purchases as agent for his mother likewise lacks privity).

14. See Annot., 75 *A.L.R.2d* 112 (1961).

15. The earliest decision seems to have been that of the Washington Supreme Court, in 1913, *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

16. Prosser, *The Assault*, *supra* note 1, at 1103-04. For an interesting article covering the general area, see Murray, *Implied Warranty Against Latent Defects: A Historical Comparative Law Study*, 21 *LA. L. REV.* 586 (1961).

17. See Prosser, *The Assault*, *supra* note 1, at 1107-08, listing the following states: Arizona, California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Texas, Virginia and Washington; the same result being accomplished by statute in Connecticut, Georgia, Minnesota, Montana and South Carolina. To that total, compiled in 1960, may be added these: *Nebraska*, *Brown v. Globe Labs.*, 165 Neb. 138, 84 N.W.2d 151 (1957) (*semble*); *New Jersey*, *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69

ing that the warranty "runs with the product,"¹⁸ while others have relied more extensively upon the language of public policy,¹⁹ but since the result is the same perhaps any distinction is immaterial.

Beyond the area of deleterious food, relaxation of the privity rule has been more slow, at least until recently. The first such extensions involved food for animals²⁰ and defective containers of food. While Prosser has characterized the conflict over the food container as "an astonishing little argument,"²¹ its presence seems understandable if not always logical. Food is one thing, but a container, not intended for consumption, is another and a court which wished to go no further than food might naturally balk when it was the container in question. Nevertheless, several decisions have found the analogy to food appealing, and have allowed recovery.²² Pursuing the analogy even further, isolated courts have abandoned the privity rule in situations involving products intended for bodily application²³ and those intended for bodily injection.²⁴

All such advances, it will be noted, depended at least partially upon a carry-over of the reasoning involved in the food exception. To extend the abrogation of the privity rule to products whose nature precluded the use of such reasoning required a far greater step, and one which for a period of time it appeared the courts might refuse to take. However, as noted in the introduction to this comment, a number of courts within the last ten years have managed to take the plunge, often with potentially far-reaching results. It is these decisions and their ramifications to which attention is now directed.

II. THE NON-FOOD CASES

The leading case, and one which "probably [represents] the most important decision in the products liability field since *MacPherson v. Buick Motor Co.*,"²⁵ is

(1960); *New York*, *Greenberg v. Lorenz*, 213 N.Y.S.2d 39, 9 N.Y.2d 195, 173 N.E.2d 773 (1961); *Tennessee*, *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. App. 1960) (*semble*). Cf. *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961). But see DEFENSE RESEARCH INSTITUTE, PRODUCTS LIABILITY 21-23 (monograph), listing only 16 states as having abandoned the privity rule.

18. *E.g.*, *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927).

19. *E.g.*, *Simmons v. Wichita Coca Cola Bottling Co.*, 181 Kan. 35, 309 P.2d 633 (1957); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

20. *McAfee v. Cargill, Inc.*, 121 F. Supp. 5 (S.D. Cal. 1954) (dog food); *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959) (trout food).

21. Prosser, *The Assault*, *supra* note 1, at 1138.

22. *E.g.*, *Canada Dry Bottling Co. v. Shaw*, 118 So. 2d 840 (Fla. App. 1960); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953).

23. *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); *Markovich v. McKesson & Robbins*, 106 Ohio App. 265, 149 N.E.2d 181 (1958) (permanent wave solution) (*semble*); *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 1121, 253 S.W.2d 532, 537 (St. L. Ct. App. 1952) (soap) (*dictum*).

24. *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960) (polio vaccine).

25. 1 FRUMER & FRIEDMAN, *op. cit. supra* note 2, at 406.

to be found in *Henningsen v. Bloomfield Motors*,²⁶ handed down in 1960 by the Supreme Court of New Jersey. The facts involved a new Plymouth automobile which Mr. Henningsen, intending a Mother's Day gift to his wife, had purchased from the local DeSoto-Plymouth dealer. The car was serviced by the dealer (what adjustments or tests were made is unclear) and delivered two days later. As Mrs. Henningsen was driving some twelve days thereafter a loud noise was heard from under the hood ("It felt as if something cracked,"),²⁷ the steering wheel spun out of control, and the car crashed into a highway sign and a brick wall. Suit, based on theories of implied warranty and negligence,²⁸ was brought against both the dealer and manufacturer (Chrysler Corporation), Mrs. Henningsen seeking recovery for her personal injuries and her husband for loss of consortium and damage to the car.

Faced with a situation wherein Mrs. Henningsen was in privity with neither defendant, and her husband only with the dealer, the court, per Justice Francis, attacked the problem in forthright fashion. After discussing generally the implied warranty theory and modern marketing procedures, the court stated:

With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of "consumer" was broader than that of "buyer." He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life and limb, then society's interest can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.²⁹

The court then noted that many cases had refused to proceed beyond the food exception, but declined to be bound by them:

We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.³⁰

As would be expected from such language, the implied warranty claim was sustained as to both plaintiffs.

26. 32 N.J. 358, 161 A.2d 69 (1960) (overruling, as to the privity question, all prior New Jersey cases mentioned in this comment).

27. *Id.* at 369, 161 A.2d at 75.

28. The negligence count was dismissed by the trial court, and although plaintiffs cross-appealed on the issue the Supreme Court, after holding in favor of the implied warranty, found it unnecessary to consider the question.

29. *Henningsen v. Bloomfield Motors*, *supra* note 26, at 379, 161 A.2d at 80-81.

30. *Id.* at 383, 161 A.2d at 83.

Henningsen is significant in several respects. The case in its extension of the attack upon privity to a purely mechanical product was one of the first to issue from a court of last resort. The opinion, moreover, in its method of review and explicit language, is a model of clarity. There was, it will be noted, no reference to any theory through which privity could be found but rather a straightforward abrogation of the rule. Lastly, the breadth of the language and reasoning used may prove to be precedent for accomplishing even more than the case itself did. But significant as *Henningsen* is, it is neither the first nor the last case to arrive at a similar result.

The first extension of implied warranty recovery, *sans* privity, to articles other than food and those intended for bodily application is apparently traceable to a 1951 decision by an intermediate appellate court in Ohio.³¹ The defective product involved was a grinding wheel which injured an employee of the purchaser. The case proved of little subsequent value however, for following decisions by the highest court of the State soon cast doubt upon its validity.³²

In 1958 two more decisions extended the attack upon the privity requirement. In a case concerning defective concrete blocks used in building a cottage the Michigan Supreme Court declared, ostensibly at least, that they would no longer "be hobbled by such an obsolete rule and its swarming progeny of exceptions."³³ The opinion, however, rather confusingly equated implied warranty recovery with negligence principles,³⁴ and for that reason its full impact has until very recently remained somewhat uncertain.³⁵ The second case, from an intermediate Florida court, was more clear.³⁶ The product in question was an allegedly unsound electric cable, manufactured by the defendant and purchased by the plaintiff through a supply house. After reviewing several recent Florida decisions the court concluded

31. *DiVello v. Gardner Mach. Co.*, 46 Ohio Op. 161, 102 N.E.2d 289 (Ct. App. 1951).

The well known decision in *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932), is older by 19 years, but seems much more analogous to the advertising cases mentioned in note 14, *supra*.

32. In 1953 the Ohio Supreme Court refused to dispense with the privity requirement in an implied warranty case involving a defective electric blanket. *Wood v. General Elec. Co.*, 159 Ohio St. 273, 112 N.E.2d 8 (1953). *Accord*, *Kennedy v. General Beauty Prods., Inc.*, 112 Ohio App. 505, 167 N.E.2d 116 (1960). *But cf.* *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 249-50, 147 N.E.2d 612, 616 (1958) (dictum, intimating that the *Wood* case might be overruled should a similar set of facts arise again). See also *Markovich v. McKesson & Robbins*, *supra* note 23.

33. *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 128, 90 N.W.2d 873, 877 (1958).

34. "We also find that in Michigan—whatever the rule may be elsewhere—there is authority for treating actions . . . based upon implied warranty by the manufacturer as though they were explicitly grounded upon negligence." *Id.* at 130, 90 N.W.2d at 878.

35. The confusion seems to have been dispelled at last in *Manzoni v. Detroit Coca Cola Bottling Co.*, 363 Mich. 235, 241, 109 N.W.2d 918, 922 (1961), holding that "in a suit upon a warranty theory it is not necessary to show negligence."

36. *Continental Copper & Steel Indus. v. E. C. "Red" Cornelius*, 104 So. 2d 40 (Fla. App. 1958).

that in that jurisdiction privity of contract was no longer essential to implied warranty recovery. The case, unfortunately, while apparently approved by more recent pronouncements of the State Supreme Court,³⁷ has been at the same time limited thereby, and the exact status of the privity rule in Florida remains somewhat questionable.

In 1959 a fourth State added its voice, and ominous rumblings were heard from yet another. A Pennsylvania court, intermediate again, decided that the breaking of a defective kingpin which caused a truck tractor to overturn was a proper subject for breach of implied warranty, "and [that] proof of contractual relationship or privity between the manufacturer and the purchaser [was] not necessary to impose liability for damage."³⁸ The cases relied upon by the court to support this conclusion are perhaps questionable, but the decision has never been overruled or limited. The rumblings mentioned were those of the Supreme Court of Minnesota.³⁹ The case, involving a defective trailer, was resolved by finding that an express warranty had been given by the defendant and that privity did in fact exist, but the opinion, after a lengthy discussion of implied warranties and the privity rule, evinced what appears to be an obvious willingness to dispense with the doctrine of privity when and if the proper case should arise.⁴⁰

It was in 1960, of course, that *Henningsen* was decided, and that alone would be enough to make the year a banner one, at least as far as the advocates of strict liability are concerned. But if that were not enough, another New Jersey court reaffirmed *Henningsen* in a second automobile case,⁴¹ and two other States apparently added their weight to the break with the food limitation.

The Tennessee Court of Appeals, dealing with a situation in which a party not in privity suffered permanent injuries as a result of defective brakes in a car purchased by her husband, succeeded in allowing what seems to be implied warranty recovery despite the obstacle.⁴² The decision, however, is far from clear. The court first held that the express warranty given by the manufacturer ran to both husband and wife, but failed to mention the privity requirement. Feeling

37. *Carter v. Hector Supply Co.*, 128 So. 2d 390 (Fla. 1961). The exact meaning of the decision is uncertain. It was first stated that a defective riding sulky, the collapse of which injured an employee of the purchaser, was not a "dangerous article," but the court seemed to intimate that if the action had been brought against the manufacturer instead of the retailer it might have been sustained. *Accord*, *Odum v. Gulf Tire & Supply Co.*, 196 F. Supp. 35 (N.D. Fla. 1961). *But cf.* *McBurnette v. Playground Equip. Corp.*, 137 So. 2d 563 (Fla. 1962), holding that a minor child, injured while using playground equipment purchased by his father, is the "third party beneficiary" of an implied warranty running from the defendant retailer to the father. The court claimed, however, that it did not intend any *basic* infringement of the privity rule. *Id.* at 567.

38. *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 430, 156 A.2d 568, 572 (1959).

39. *Beck v. Spindler*, 256 Minn. 543, 99 N.W.2d 670 (1959).

40. *Id.* at 561, 99 N.W. at 681-82.

41. *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 164 A.2d 773 (App. Div. 1960).

42. *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. App. 1960), *cert. denied*, Tenn. Sup. Ct.

perhaps that this reasoning would not entirely dispose of the controversy, the court then found an implied warranty existing as to both plaintiffs, but again said nothing of the privity question. It was not until rehearing that the court finally disposed of the problem, even then managing to cloud the issue by relying wholly upon negligence cases.⁴³ The meaning of the case has been questioned,⁴⁴ as well it might be, but at least in its result it does support the proposition that privity is unnecessary to recovery upon implied warranty, even as to products other than food.

The second 1960 decision worthy of mention was that of the California Supreme Court in a case involving a rubber grinding wheel which exploded in the face of an employee of the purchaser.⁴⁵ The court, in rather novel fashion, claimed to find privity in fact by defining privity as "mutual or successive relationship to the same thing."⁴⁶ Since the privity rule as generally understood refers to privity of contract, which was obviously not present in the case, such reasoning seems a mere subterfuge. The decision for these reasons is, of course, far from satisfactory, but in view of other California decisions⁴⁷ and the presence of Judge Traynor⁴⁸ upon the court, it would seem that that jurisdiction may not be a great distance from a forthright abrogation of the rule.

Following all of these cases, a 1961 decision by the Supreme Court of Iowa⁴⁹ and a 1962 ruling by a lower appellate court in New York⁵⁰ have become the latest of the series. In the Iowa case a new Mercury automobile suddenly burst into flames some ten days after its purchase. Evidence at trial tended to show that the fire was the result of defective wiring. Relying heavily upon the reasoning and language of *Henningsen*, the Iowa court allowed implied warranty recovery against the manufacturer, and in so doing explicitly abandoned the privity rule. The New York court's holding was more cautious, but since that jurisdiction has long been one of the strongholds of privity its hesitancy is understandable. The product in question was a dental chair which collapsed under the plaintiff, an em-

43. The two principal cases cited were *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S.W. 421 (1912), and *Dunn v. Ralston Purina Co.*, 38 Tenn. App. 229, 272 S.W.2d 479 (1954). Both are discussions of the privity rule in connection with negligence actions, and furnish no support for an abandonment of the rule as to implied warranties.

44. See Comment, 28 TENN. L. REV. 379, 394 (1961).

45. *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

46. *Id.* at 347, 5 Cal. Rptr. at 869, 353 P.2d at 581.

47. See *Gottsdanker v. Cutter Labs.*, *supra* note 24; *Garon v. Lockheed Aircraft Corp.*, 29 U.S.L. WEEK 2584-85 (Cal. Super. Ct., L.A. County, May 29, 1961) (wrongful death action, predicated upon breach of implied warranty; decedent passenger held to be within the "commercial family" of the purchaser of the aircraft).

48. Judge Traynor has long been one of the leading advocates of strict liability, and a good many of the arguments advanced in favor of it stem in part from his concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

49. *State Farm Mut. Auto. Ins. Co. v. Anderson Weber, Inc.*, 110 N.W.2d 449 (Iowa 1961).

50. *Thomas v. Leary*, 225 N.Y.S.2d 137 (App. Div. 1962). *Accord*, *Simpson v. Eichenbrunner*, 217 N.Y.S.2d 678 (App. Div. 1961) (defective machine).

ployee of the purchaser. The court upheld an implied warranty action against the retailer, finding precedent in a recent New York food case⁵¹ and stating that there existed no logical distinction between defective food and a defective dental chair. This of course was the word of only an intermediate court, but its validity seems assured for a very recent decision by the highest court of New York (as yet unprinted) would seem to indicate that that state has indeed set itself in the footsteps of Iowa and New Jersey.⁵²

Such have been the state court decisions upon the subject. Since the federal courts, following the *Erie* case,⁵³ are bound to apply state law to situations of the sort discussed in this comment, their opinions, at least theoretically, are limited to defining the extent of the applicable state court decisions. But federal judges, when given a toehold by the law of the state, have often been remarkably prone to advance implied warranty liability at the expense of the privity requirement. Indeed, some of the most forward looking cases have emanated from this source. Applying Kansas law in 1959, the Court of Appeals for the Tenth Circuit refused to honor the privity rule in a case involving a defective tire and a guest,⁵⁴ and in so holding seems to have reached a result that is acceptable to the Kansas courts⁵⁵ although no State court in that jurisdiction has yet gone so far. An even more interesting decision was that of a Federal District Court in Hawaii, in a recent case involving a flammable hula skirt, borrowed by the injured party from the purchaser.⁵⁶ After an exhaustive review of authorities the court sustained an implied warranty action against the retailer. Since there are no decisions from the State courts in Hawaii the case will doubtless serve as strong precedent when the issue first comes before them. Other federal cases have added further scope by applying Michigan law to the recipient of a defective surgical pin,⁵⁷ Pennsylvania law to the purchaser of insect spray⁵⁸ and a guest in another automobile,⁵⁹ and California law to passengers in allegedly defective aircraft.⁶⁰

A. Significance of the Cases

These cases represent, obviously enough, a trend of sorts; Prosser noted this even before the 1960 and 1961 decisions.⁶¹ Yet there are trends of many sorts in

51. *Greenberg v. Lorenz*, *supra* note 19.

52. *Randy Knitwear, Inc. v. American Cyanamid Co.*, 30 U.S.L. WEEK 2420-21 (N.Y. Ct. App., Feb. 22, 1962) (shrinkage of garments resulting from use of defendant's chemical treatment; privity lacking; apparently a reliance upon defendant's express representations).

53. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

54. *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959).

55. See *Rupp v. Norton Coca Cola Bottling Co.*, 187 Kan. 390, 392, 357 P.2d 802, 803 (1960), quoting from *Hammond* and expressly approving it.

56. *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961).

57. *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960).

58. *McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 (D. Conn. 1960).

59. *Thompson v. Reedman Motors*, 199 F. Supp. 120 (E.D. Pa. 1961).

60. *Taylorson v. American Airlines, Inc.*, 183 F. Supp. 880 (S.D.N.Y. 1960); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959).

61. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1113 (1960).

the modern law, and few of them have been accorded the heated discussion which has characterized this one. The key to this controversy and to a proper analysis thereof lies in an understanding of the nature of implied warranty liability.

To begin with, concepts of negligence, and fault as defined by negligence standards, have no place in warranty liability. Although courts have sometimes seemed confused on the matter,⁶² the great weight of judicial opinion has stated that proof negligence is unnecessary to liability for breach of implied warranty, and that lack of negligence is, for defense purposes, immaterial.⁶³ In a similar fashion, lack of scienter on the part of the defendant is no defense.⁶⁴ Finally, since the warranty is *implied*, either in fact or in law, there need be no express representations or agreements by the defendant.⁶⁵

Implied warranty recovery rather, in its application to the products liability field, is predicated upon two factors. As a matter of establishing *liability* there is only one truly fundamental requirement: that the product or article in question have been transferred (normally by sale, although a technical sale may not always be necessary)⁶⁶ from the defendant's possession while in a "defective" state.⁶⁷ More specifically, the product must either fail to be "reasonably fit for the particular purpose intended" or fail to be of "merchantable quality," as those two separate but often overlapping terms are defined by the law of implied warranty.⁶⁸ In the products liability field, of course, such an article will be one which, as a proximate result of being "defective," causes personal injury or property damage. And here it is that the second factor—the measure of damages recoverable—makes its presence felt. Although some of the earliest cases⁶⁹ did indeed discuss implied warranty damages in connection with the "contemplation of the parties" rule set forth in *Hadley v. Baxendale*,⁷⁰ modern courts have tended to obliterate any such restriction (if it ever was one). As one authority puts it, "the measure of damages in warranty and negligence cases is, for all practical purposes, the same."⁷¹ Thus,

62. See, e.g., *Spence v. Three Rivers Builders & Masonry Supply*, *supra* note 34.

63. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.01 (1960); PROSSER, TORTS 494 (2d ed. 1955); 1 WILLISTON, SALES § 237 (3d ed. 1948).

64. 1 WILLISTON, *op. cit. supra* note 63.

65. *Id.* at 584.

66. 1 FRUMER & FRIEDMAN, *op. cit. supra* note 63, at 497-98. See generally *id.* §§ 19.02, 26.03(2)b (discussing bailments, illegal sales, and injuries occurring before sale was consummated).

67. In actual practice the requirements of implied warranty law are a good deal more technical and complicated than is indicated by the brief treatment given in this comment. Since the present discussion is directed more toward the privity requirement and strict liability it was felt that the above analysis would suffice. For more detailed treatments, see generally UNIFORM COMMERCIAL CODE §§ 2-314 to -318; UNIFORM SALES ACT §§ 14-15; VOLD, SALES §§ 89-95 (2d ed. 1959); 1 WILLISTON, *op. cit. supra* note 63, §§ 227-57.

68. See UNIFORM COMMERCIAL CODE §§ 2-314, -315; UNIFORM SALES ACT § 15(1), (2); VOLD, *op. cit. supra* note 67, at 435-43.

69. *E.g.*, *Agius v. Great W. Colliery Co.*, 1 Q.B. 413 (C.A. 1899); *Hammond & Co. v. Bussey*, 20 Q.B.D. 79 (1887); *Smith v. Green*, 1 C.P.D. 92 (1875).

70. *Hadley v. Baxendale*, 9 Exch. 341 (1854).

71. 1 FRUMER & FRIEDMAN, *op. cit. supra* note 63, at 362.

speaking generally, an action for breach of implied warranty stands for the proposition that liability is to be incurred, regardless of fault or scienter, whenever the article in question is shown to have been defective upon leaving the defendant's hands, and that damages may be recovered under this liability for any consequential injuries proximately caused by such defectiveness.

Insofar as liability is incurred regardless of any fault, the end result of all this is, obviously, the imposition of strict liability, or at least a species thereof. It is in an awareness of this fact that most of the controversy has arisen; for to a good many members of Anglo-American society (obviously manufacturers, for one), long adjusted to liability predicated upon fault, the concept of liability without fault is a rather horrifying concept.⁷² It is herein also that we find the peculiar significance of those recent cases discussed in this comment. As long as the doctrine of privity remained unscathed then "strict liability" was at least restricted to a relatively small area of application. Even with the relaxation of the rule in the case of deleterious food, the extension of strict liability was not overwhelming, for there remained a countless number of commercial articles which fell outside that classification. But if a court should decide to abandon the privity requirement as to products other than food and related articles, then the possibility of strict liability imposed throughout a great area of our law would become a reality. And, at least to an extent, this is exactly what the previously mentioned cases have done.

Lest it be thought, however, that these courts have been openly dealing with strict liability as such, it seems advisable at this juncture to point out that in reality one usually does not find even a mention of that term as far as the opinions themselves are concerned. This perhaps anomalous result stems, by and large, from the fact that many of the presently existing cases have been far more concerned with a mechanical approach relating to concepts of warranty and the logic of the privity requirement, rather than with any discussion of the merits of strict liability itself. This seems unfortunate, for such an approach, standing alone, may not only obscure the result but even more unfortunately, may tend to obscure the real issues and problems involved.

Solely as a matter of logic, an abandonment of the privity rule seems unimpeachable. One begins with the proposition that as between the parties to a sale strict liability in the form of an implied warranty has long existed. Good or bad, such liability is firmly entrenched in our law, and it is inconceivable that a court would blot it out at this late date. If this theory is inserted into the framework of our present economic society, the limitations of the privity requirement in the non-food area do indeed seem quite illogical. Although at least one scholar has argued in favor of an inherent distinction between food on the one hand and mechanical articles on the other,⁷³ the factual situations in the non-food cases

72. For an excellent example of the sentiment which these cases have aroused in some scholars, see DEFENSE RESEARCH INSTITUTE, *PRODUCTS LIABILITY* (monograph).

73. Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928 (1957).

themselves point out the fallacy of such a proposition.⁷⁴ As to the advertising factor, it is undeniably true that a great many manufacturers do operate over the heads of their distributors, in more or less direct relationship with the consuming public. And finally, it does in truth seem a highly inconsistent and illogical rule that settles strict liability upon the shoulders of a retailer who merely sold the product and yet refuses to carry it to the manufacturer who produced or assembled it, and who, if anyone, could have prevented the defect.

Such reasoning points out, quite rightly it would seem, that the privity rule is a rather indefensible requirement, at least when considered apart from the end which it has sought to advance. But consideration of the problem in this manner alone seems somewhat imperfect. The situation becomes analogous to that of a person who refuses to run from an onrushing snow slide because there is no logical or inherent difference between the particles of snow in the mass bearing down upon him and the flake which dropped lightly upon his arm. The truly fundamental issue at stake here is not whether the privity requirement itself is logical or illogical, but instead whether a system of strict liability should be extended throughout so great an area of our law. As to this question, unfortunately, the traditional arguments attacking the privity rule are of little help. Thus, for example, the proposition that through modern advertising the manufacturer does in fact deal directly with the consumer tells us only that some sort of liability should be imposed, not why it should be strict liability rather than liability based upon fault. In view of this fact, it would seem that any real criticism or justification of the recent cases discussed herein must turn, in the last analysis, upon arguments more directly concerned with strict liability itself; arguments much less often found in the cases themselves. What, then, are the relative merits of a system of strict liability?

III. THE ARGUMENTS FOR AND AGAINST STRICT LIABILITY

Before beginning an analysis of the various arguments relating to strict liability in this area, it seems necessary to point out that any approach to the question is doomed to be at least partly a matter of value judgment, and even more one of conjecture. As a reading of the material to follow will indicate, there have been made no truly analytical and factual studies which would serve as a measuring stick for the various propositions advanced. Without such an aid any significant

74. Professor Green based his reasoning upon three arguments. (a) Food is to be consumed immediately; a mechanical product on the other hand will be in use over a much longer period, during which time defects may be discovered. (b) A mechanical product is far more subject to abuse at the hands of the consumer than is food. (c) Since food is consumed the evidence of negligence will be unavailable at trial, while a defective mechanical product is normally capable of being produced for the court's inspection.

A single reference to *Henningsen* seems sufficient to refute these arguments. It will be noted in that case that the accident occurred only twelve days after purchase, prior to which time no evidence of a defect was noted. The evidence further failed to show any abusive treatment. Lastly, any tangible evidence of defectiveness was completely destroyed, all testimony in the case being apparently based upon expert conjecture.

conclusion is of course difficult to reach. In spite of this lack, however, at least an attempt should be made to discuss some of the relative strengths and weaknesses involved.

Aside from any consideration of factors already mentioned, the arguments in favor of imposing strict liability are roughly separable into the following four categories:

(1) The necessity of proving negligence may often place an impossibly heavy burden upon the injured party, and therefore a remedy is needed which will aid his recovery by dispensing with that requirement.⁷⁵

(2) The imposition of strict liability will provide incentive for manufacturers to make their products more safe.⁷⁶

(3) Strict liability is even now imposed upon the manufacturer through a series of warranty actions by successive vendees, and as a matter of practicality there is no need for such multiplicity of action.⁷⁷

(4) When injury occurs as the result of a defective product then responsibility for that injury should be borne by the party most able to carry it—in this area the manufacturer—and redistributed to the general public in the form of higher prices upon the commodity.⁷⁸

Countering these arguments, three general theories have been advanced in opposition to a system of strict liability:

(1) The imposition of strict liability will impede the development of new and beneficial products.⁷⁹

(2) Disposing of the negligence requirements will leave the door ajar to an overwhelming flood of fraudulent claims.⁸⁰

(3) As a philosophical matter, strict liability is a concept foreign to our way of living.⁸¹

The most persuasive of the four arguments in favor of strict liability, and the one most often advanced, is the last; known usually as the "risk-spreading" theory. Its essence was formulated by Judge Traynor in the following language:

Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market . . .

75. See, e.g., LLEWELLYN, *CASES ON SALES* 341 (1930); PROSSER, *TORTS* 505-06 (2d ed. 1955); Ashe, *So You're Going to Try a Products Liability Case*, 13 *HASTINGS L.J.* 66, 74 (1961).

76. See, e.g., James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 *TENN. L. REV.* 923 (1957); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 *TENN. L. REV.* 963, 1011 (1957).

77. See, e.g., Noel, *supra* note 76, at 1013-14.

78. See, e.g., EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951) *passim*; James, *supra* note 76; Noel, *supra* note 76, at 1014-15.

79. See Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 *TENN. L. REV.* 938, 950 (1957).

80. *Id.* at 949.

81. *Id.* at 940-44.

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time and health may be an overwhelming misfortune to the person injured, and a needless one, *for the risk of injury can be insured against by the manufacturer and distributed among the public as a cost of doing business.* It is to the public interest to discourage the marketing of products that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.⁸²

It has been strongly urged by some that such an idea is a building without foundation, in that it presumes all manufacturers to be equally able to bear the losses which will be imposed by a system of strict liability, when in fact they are not. Thus, one writer has been led to state:

The fact is, however, that most of our manufacturing industries are not monopolies in which the manufacturer can dictate price. In these industries prices are determined by a host of factors As a result of these economic factors it may often be a matter of pure chance as to whether a given manufacturer or industry can adjust its price structure to absorb a new cost thrust upon it. In the case of an individual an increase may mean pricing himself out of the market. In the case of an industry a substantial general addition to price may have a devastating effect upon marginal producers. . . . It may very well be . . . that large corporations . . . can absorb or distribute an item of increased cost such as that which would result from the imposition of strict liability. But many manufacturers are in a totally different situation. Their position in the industry is vulnerable and their competitive situation delicate. It is these comparatively small manufacturers who suffer when additional costs are added without regard to their situation.⁸³

Statements of this nature, however, seem to miss the full import of Judge Traynor's argument. Liability is not simply carried back to the manufacturer, there to be imposed with a "deep pocket" philosophy. The idea, rather, is that the manufacturer will insure himself against liability (presumably this is done by some concerns now), and spread the cost of such insurance by including it as a part of the price of his wares. There would seem to be no reason why even a small manufacturer could not afford such insurance without a "devastating effect" upon his competitive position, since it is to be expected that the number of injuries inflicted and thus the amount of liability incurred would roughly correspond to the volume of business done. Furthermore, if a particular manufacturer is in fact producing a greater proportion of defective articles than other producers of the same article, then perhaps this is exactly the sort of situation which the imposition of strict liability is designed to combat. Lastly, it is at least questionable that there would be created any significant increase in liability at all. As Prosser seems to

82. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (concurring opinion). (Emphasis added.)

83. *Plant*, *supra* note 79, at 947.

infer, there might well be little difference between the number of judgments now rendered under theories of negligence coupled with the doctrine of *res ipsa loquitur*, and those to be expected under a system of strict liability.⁸⁴

Apart from a matter of individual judgment then, the risk-spreading theory seems difficult to refute. As to the other three arguments in favor of strict liability, unfortunately, such does not appear to be the case. The "inadequacy of the remedy" argument, for example, appears subject to several shortcomings. In the first place, it amounts to putting the cart before the horse to say, without more, that liability based upon negligence is inadequate even when recovery must fail because proof of negligence is too heavy a burden, for in truth that remedy can be termed "inadequate" only insofar as public opinion demands greater ease of recovery. But, even assuming that public opinion does so dictate, the argument may still be subject to practical difficulties. In a products liability case the doctrine of *res ipsa loquitur* is normally available, as a practical matter if not theoretically.⁸⁵ In application this will carry the negligence question to the jury, and Prosser has characterized the end result by stating that "a jury verdict for the defendant on the issue of negligence is virtually unknown."⁸⁶ While that statement may possibly constitute an over-generalization, the point which Prosser ably argues is that, as a question relating simply to the adequacy of the remedy involved, much that would be accomplished under a system of strict liability is already being effected with negligence principles.

The second argument, referring to an expected increase in safety measures, is also subject to question. As one author has pointed out, as a practical matter even under existing negligence liability, a manufacturer who fails to use the most advanced safety techniques "is virtually certain to be found negligent and held liable."⁸⁷ This being the case, one is forced to wonder what further could be accomplished under a system of strict liability.

The third proposition, that strict liability does in fact exist even now and that needless multiplicity of suits is to be avoided, seems valid to the extent to which it is applicable, but it presumes only a portion of the problem. It is quite true that when the injured party is a *sub-vendee* (i.e., a purchaser) he may recover from his immediate vendor for breach of implied warranty and that this vendor, seeking indemnification, may proceed against *his* vendor by means of implied warranty, and so on until the manufacturer is reached. But where the plaintiff was not a purchaser, any original warranty recovery is precluded unless the bars of privity be lowered. Since an injured party of this type is as much within the area under discussion as is a purchaser, the theory is subject to a rather obvious flaw.

On the other hand, the arguments against strict liability seem quite as open

84. Prosser, *The Assault*, *supra* note 61, at 1114-15.

85. *Ibid.* See generally, 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 12.03 (1960); 2 HARPER & JAMES, TORTS §§ 19.5-.12 (1956); PROSSER, TORTS §§ 42-43 (2d ed. 1955).

86. Prosser, *The Assault*, *supra* note 61, at 1115.

87. Plant, *supra* note 79, at 945.

to attack as the last three from the reverse side of the coin. As a relative matter, it does not appear that the strict liability rule of *Rylands v. Fletcher*⁸⁸ has, where applied, impeded the development of any industries which it encompasses, nor has workmen's compensation, or the growth of negligence liability from which manufacturers once were insulated. Moreover, it appears a distinct possibility that certain products which are of vital public interest, but which are in such a newly developed stage that defects are to be expected, may be either the subject of statutory exemption⁸⁹ or, if needed, of an adjusted judicial interpretation of the concept of defectiveness.⁹⁰ To the claim that vast numbers of fraudulent suits will be the result of imposing strict liability, it may be answered that even under existing negligence liability, once the doctrine of *res ipsa loquitur* is invoked the presence of a negligence issue constitutes not one whit of insurance against a fraudulent claim. It seems unlikely, therefore, that the advent of strict liability would witness any great increase in the number of fraudulent suits, especially if, as one writer has suggested, the courts maintain standards of proof as to causation and defectiveness.⁹¹ Finally, as to the contention that strict liability is a concept foreign to our society, it must be noted that as a matter of fact strict liability has long been recognized in the case of unnatural substances which escape⁹² and the keeping of wild animals,⁹³ not to mention workmen's compensation.

Another problem yet remains, however. Even if the risk-spreading argument in favor of strict liability be accepted, one might still remark: Well and good, when there is no fault on the part of either party; but why impose strict liability as a blanket rule, even to cases where there is negligence involved? This, apparently, is what worried the Michigan court when in the *Spence* case it was said:

We suggest in the future, however, that where warranted by the circumstances, such declarations should sound explicitly in negligence as well as for claimed breach of warranty.⁹⁴

The short answer to this proposition is simply that a blanket rule of strict liability for the area seems more logical and easier of application. The end result

88. 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Exch. 265 (1866), original holding *aff'd*, L.R. 3 H.L. 330 (1868). See generally HARPER & JAMES, *op. cit. supra* note 85, §§ 14.2-8; PROSSER, *op. cit. supra* note 85, § 59.

89. See for example, CAL. HEALTH & SAFETY CODE § 1623, relating to the procurement, processing, and distribution of blood, plasma, or blood products.

90. See, e.g., Sedgwick & Conley, *Products and Warranties: The Battle Has Just Begun*, 28 INS. COUNSEL J. 201 (1961), arguing in favor of the adoption of a "reasonableness" standard. As the authors point out, that term has long been used in connection with defective products and warranty liability, and the question as to whether an article is either unfit for the intended purpose, or of unmerchantable quality is a relative, not an absolute matter. See also note 126 *infra* and accompanying text.

91. Noel, *supra* note 76, at 1016.

92. *Supra* note 88.

93. See 2 HARPER & JAMES, *op. cit. supra* note 85, §§ 14.11-12; PROSSER, *op. cit. supra* note 85, § 57.

94. *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 131, 90 N.W.2d 873, 879 (1958).

is of course to give the injured party a remedy in either case; why allow him to dispense with negligence when the defendant was not at fault and yet penalize him, comparatively speaking, by requiring the added time and expense of proving negligence when the defendant actually was at fault? As a matter of application, moreover, any restriction of this sort would doubtless pose an enormous number of appellate problems, based upon whether or not a negligence count should have been included in the pleadings.⁹⁵

In view of these considerations, what conclusions are to be drawn, hopefully toward achieving some sort of definitive answer as to the advisability of strict liability? Not a great many perhaps. As pointed out, many of the arguments relating to strict liability, both favorable and unfavorable, are entitled to be considered at most as make-weights, although the risk-spreading theory seems to give an edge to the advocates of the system. In large degree the question may still be expected to become one of individual value judgment relating to the philosophical acceptability of liability without fault. Indeed, much may depend upon how the question is phrased. If it be put, *why not* strict liability, an attack upon the proposition is difficult. If instead it be asked, *why* strict liability, the task of justification may present problems. Out of the morass, however, at least a few conclusions may be extracted. First, it does appear possible to support a system of liability without fault, at least in its economic and social aspects. Secondly, as evidenced by the ever growing number of cases based on implied warranty and related concepts and by the general trend of legal writing, there is a very definite public demand that some sort of strict liability be laid at the doorstep of the manufacturer who markets a defective product. Lastly, undoubtedly influenced subjectively if not always objectively by the arguments just presented, the courts are becoming increasingly prone to give heed to the demand. While at first glance this trend may seem startling, perhaps when viewed against the general backdrop of history it is not. There can be little doubt that the conception of liability based upon negligence was designed at least in part to aid the growth of industry.⁹⁶ The general problems of the industrial revolution, however, are in many respects no longer with us. With a realization of this fact it is understandable that the courts and the general public are leaning more and more in the direction of strict liability. Or, as Professor Gregory put it:

Changing times and the amazing growth of our industries, together with a gradual shift in the basis of political power, are factors which affect the direction of judicial thinking. When the public becomes con-

95. This last statement is of course not meant to intimate that, at least as far as the law in its presently developed state is concerned, a negligence count should not be included. One who bases his pleading entirely upon warranty liability and loses the argument over the privity requirement will find himself faced either with the prospect of losing his case entirely, or at least being forced to amend his petition. As a practical matter then, it is simply good insurance to plead negligence. As a matter of legal theory, however, there seems to be no reason why the inclusion of such a count should be *required*.

96. See Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

vinced that they are entitled through some kind of social security to protection against the ordinary hazards of life, and when the idea gets around that industry not only has no further need of subsidization but also should be made to assume the burden of paying for all damages resulting from its normal operations, then the climate is right for judges to begin making an honest woman of the theory of absolute liability without fault. They can then safely acknowledge her when they see her coming and, indeed, even declare they had always thought highly of her.⁹⁷

IV. TO WHOM, FOR WHAT INJURIES, FROM WHICH PRODUCTS

If we are to abandon the privity requirement as to products other than food, and thus impose a type of strict liability throughout a relatively large segment of our law, it obviously becomes necessary to determine which injured parties shall be accorded this measure of relief. Further problems arise in connection with distinctions between situations involving personal injuries and property damage, and between injuries caused by one type of article or product as opposed to those caused by another type. How the recent non-food cases have treated these questions is significant, even if not always completely enlightening.

A. To Whom

As to the problem regarding which parties are to receive the benefits of strict liability, at least two distinctions may be indicated. One commentator⁹⁸ has drawn a contrast between what is termed "vertical privity" on the one hand, and "horizontal privity" on the other. The former term draws reference to a sub-vendee—one who actually purchased the injurious product; the latter term designates one who did not purchase the articles but was injured by it. The theory is that many of the arguments directed against the privity requirement, of which the advertising factor is a good example, usually relate only to the vertical type, and that it requires the clearing of a complete new hurdle to extend implied warranty recovery to one who has had no contractual relationship at all as to the product. At least one of the recent cases has noted this distinction, although it shed little light on how difficult it thought the clearing of the hurdle might be.⁹⁹ A second distinction, the importance of which will be discussed later, concerns a refinement of the horizontal privity category and draws a contrast between those who were users of the article, and those who have no connection with the product at all.

How have the recent non-food cases treated these distinctions? As to the first mentioned, not at all, as a matter of fact. *Dodson*¹⁰⁰ and *Henningsen*¹⁰¹ both dealt

97. *Id.* at 382-83.

98. Comment, 28 TENN. L. REV. 379, 382 (1961).

99. Beck v. Spindler, 256 Minn. 543, 563, 99 N.W.2d 670, 683 (1959).

100. General Motors Corp. v. Dodson, 338 S.W.2d 655 (Tenn. App. 1960) cert. denied, Tenn. Sup. Ct.

101. Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

at least in part with the wife of the purchaser. Another case from New Jersey, upon the authority of *Henningsen*, has included a brother of the purchaser.¹⁰² The *DiVello*,¹⁰³ *Peterson*,¹⁰⁴ and *Thomas*¹⁰⁵ decisions extended the recovery to an employee of the purchaser, although as previously mentioned the exact import of the *Peterson* case is arguable. Two federal courts, applying Pennsylvania¹⁰⁶ and Kansas¹⁰⁷ law, have allowed recovery by a guest, with little discussion of the matter, and two others have imposed liability for wrongful death in favor of the relatives of passengers on an airplane.¹⁰⁸ Going even further, the *Chapman* case allowed recovery by a mere borrower.¹⁰⁹

The import of such holdings is rather significant. If one is to be occupied, or preoccupied, as the case may be, solely with warranty concepts, then to allow recovery to one who had no contractual relationship at all may indeed involve a rather difficult theoretical hurdle. The fact that all these cases have done so, often without so much as a mention of the distinction, is indicative of the fact that the judicial reasoning process is much more closely attuned to pure and simple strict liability and that the implied warranty is merely a vehicle for imposing such. Even more significant, however, is the fact that once such a distinction is done away with, the only truly logical approach to the problem, short of unrestricted liability, would seem to be in the application of some sort of foreseeability test—presumably of the same type now used in determining the question of duty in negligence cases.¹¹⁰ Indeed, apparent reference to such a test is found in at least two of the decisions.¹¹¹

It is true that certain of the cases have involved members of the buyer's immediate family, a situation covered by the *Uniform Commercial Code*.¹¹² Appar-

102. *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 164 A.2d 773 (App. Div. 1960).

103. *Di Vello v. Gardner Mach. Co.*, 46 Ohio Op. 161, 102 N.E.2d 289 (Ct. App. 1951).

104. *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

105. *Thomas v. Leary*, 225 N.Y.S.2d 137 (App. Div. 1962).

106. *Thompson v. Reedman Motors*, 199 F. Supp. 120 (E.D. Pa. 1961).

107. *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959).

108. *Taylorson v. American Airlines, Inc.*, 183 F. Supp. 880 (S.D.N.Y. 1960); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959).

109. *Chapman v. Brown*, 198 F. Supp. 98 (D. Hawaii 1961).

110. See 2 HARPER & JAMES, *op. cit. supra* note 85, § 18.2 and materials cited in n.3 therein.

111. *Henningsen v. Bloomfield Motors*, *supra* note 99, at 413, 161 A.2d 69, at 99-101 (those within the "reasonable contemplation of the parties"); *Thomas v. Leary*, *supra* note 104, at 142.

112. UNIFORM COMMERCIAL CODE § 2-318. This section extends warranty recovery to "any natural person who is in the family or household of [the] buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." An interesting decision relating to this section is to be found in *Thompson v. Reedman Motors*, *supra* note 106, a case involving Pennsylvania law. Pennsylvania has adopted the *Uniform Commercial Code*, but the court reasoned that the above section would not extend to a guest in a car of the purchaser.

ently finding some magic formula in this type of wording, an employee case¹¹³ and a case involving a passenger on an airplane¹¹⁴ have sought to define the injured party's status in terms of "industrial or commercial family." Such terminology, however, in reality seems to do no more than state that it was highly foreseeable that injury would occur to that person if the article should prove defective. If this is the case it would seem far better to lay aside such fictions and to apply with open eyes the test which more rationally explains such decisions. What is to be considered foreseeable in this area is of course for the courts to decide. But surely a more logical basis for analysis would be found in the adoption of a test such as this, rather than in reliance upon narrow semantic distinctions.

All of the cases to date have involved persons who might be loosely termed *users* of the product. No court as yet has been presented with a situation wherein injury was suffered by one who had no connection with the article at all, except insofar as he was injured as a result of its defectiveness. An example of such a situation would be found if the defective automobile in the *Henningsen* case had injured a pedestrian, instead of Mrs. Henningsen. There seems to be no logical reason, though, why suit by such a person should not be sustained, so long as it accords with general tort concepts of foreseeability.¹¹⁵ Negligence cases, in abandoning the privity concept, have carried liability to this extent.¹¹⁶ As a matter of public policy such a person certainly has as much right to expect a non-defective automobile upon the public streets as does the guest who rides in one.

B. What Injuries

Is there any valid distinction to be drawn between the infliction of personal injuries, and mere damage to property? The court in a recent Missouri case¹¹⁷ indicated that it felt there was, and refused to allow recovery because only property damage was involved, but such a result seems unsound. The same theory was once adopted by a few courts when negligence was first being freed of the privity requirement, but by now has largely been repudiated.¹¹⁸ What the logical basis of such a rule would be, or what it could be expected to accomplish, is unknown. Tort

Nevertheless, recovery was allowed. This seems an acceptable position, since the official comments to the Code state that that instrument is not intended either to extend or limit the developing case law on the subject. UNIFORM COMMERCIAL CODE § 2-318, comment 3.

113. *Peterson v. Lamb Rubber Co.*, *supra* note 104, at 347, 5 Cal. Rptr. at 869, 353 P.2d at 581.

114. *Garon v. Lockheed Aircraft Corp.*, 29 U.S.L. WEEK 2585 (Cal. Super. Ct., L.A. County, May 29, 1961).

115. The *Henningsen* case seemed to intimate that this result might be reached. See 32 N.J. 358, 415, 161 A.2d 69, 101. For other discussions in accord with the textual material above, see 1 FRUMER & FRIEDMAN, *op. cit. supra* note 85, at 418-19; 2 HARPER & JAMES, *op. cit. supra* note 85, at 1572 n.6.

116. *E.g.*, *Gairdy Motors v. Brannon*, 268 S.W.2d 627 (Ky. App. 1953); *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N.W. 855 (1928).

117. *Smith v. Ford Motor Co.*, 327 S.W.2d 535, 538 (St. L. Ct. App. 1959). The court apparently overlooked *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959), a case dealing exclusively with property damage.

118. See Annot., 74 A.L.R.2d 1111, 1164 (1960).

law generally has never drawn such a distinction, nor have even the warranty cases which conceived of that remedy as contractual in nature.¹¹⁹ Certainly none of the recent non-food cases have seen fit to differentiate between the two types of injury. Two of them have granted damages for injury to property as well as to the person,¹²⁰ and at least four others have dealt exclusively with pecuniary or property loss.¹²¹

Beyond this question there are of course general problems relating to causation. The subject is too complex for development here, particularly in view of the fact that none of the cases around which this comment is centered have raised the issue. It may be pointed out as a matter for future reference, however, that it would be a relatively easy matter simply to use many of the same tests now applicable to negligence liability. Confusing as these sometimes are they do offer pre-developed standards which, as Prosser has pointed out,¹²² may prove helpful.

C. Which Products

To which products or types of products this liability is to be extended is an open question. In the decisions, as of yet, there have appeared no concrete tests or limitations. Most of the cases have alluded to "dangerous" or "imminently dangerous" types of articles, but have emasculated that terminology by adding "if defective."¹²³ Since in a sense the simple fact that injury has occurred would seem to be presumptive of the fact that the article was dangerous when defective, this may not constitute much of a limitation. Such was Cardozo's language in *MacPherson*¹²⁴ and the extension of the term in the negligence field is an old story.¹²⁵ It is of course possible to contend that the word "dangerous" should be used with reference to the inherent nature of that type of article. The cases themselves, however, have failed to invoke such a test and in reality this is perhaps fortunate. If a court finds strict liability acceptable, with or without the guise of warranty,

119. In the warranty field, as a matter of fact, the distinction when made was usually reversed, older courts sometimes holding that there could be no recovery for personal injuries. See, e.g., *Jones v. Ross*, 98 Ala. 448, 13 So. 319 (1893); *Birdsinger v. McCormick Mach. Co.*, 183 N.Y. 487, 76 N.E. 611 (1906). The normal area of application for the warranty has of course always been that of pecuniary loss or property damage.

120. *Henningesen v. Bloomfield Motors*, *supra* note 101; *Pabon v. Hackensack Auto Sales*, *supra* note 102.

121. *Continental Copper & Steel Indus. v. E. C. "Red" Cornelius*, 109 So. 2d 40 (Fla. App. 1958); *State Farm Mut. Auto. Ins. Co. v. Anderson Weber, Inc.*, 110 N.W.2d 449 (Iowa 1961); *Spence v. Three Rivers Builders & Masonry Supply*, *supra* note 94; *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

122. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1146 (1960). See also 1 FRUMER & FRIEDMAN, *op. cit. supra* note 85, at 373-75.

123. See, e.g., *Chapman v. Brown*, *supra* note 109, at 118; *Peterson v. Lamb Rubber Co.*, *supra* note 104, at 347, 5 Cal. Rptr. at 869, 353 P.2d at 581; *Henningesen v. Bloomfield Motors*, *supra* note 101, at 379, 161 A.2d at 81.

124. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

125. See PROSSER, TORTS 500-01 (2d ed. 1955).

why hedge it about with a restriction so meaningless as this? A better formula would appear to lie in a test relating to each individual article itself.

This has been the approach taken by the authors of a newly proposed section to the *Restatement of Torts*.¹²⁶ That proposal relates only to food, but the basic theory involved should prove applicable in wider scope. The definition there is framed in terms of an article "in a defective condition *unreasonably dangerous to the consumer*."¹²⁷ This, then, instead of attempting to classify as to the *type* of product, seems to consider only the particular article causing the injury and whether or not when defective in each particular case it was unreasonably dangerous. Exactly what import the word "unreasonable" carries in this context is uncertain, although it quite obviously represents an attempt to stop short of what has been referred to as "*strict strict liability*."¹²⁸ This might displease one who would adopt the full weight of Judge Traynor's risk-spreading argument, but even limited in this fashion it presents a better basis for decision than does a definition relating to types or inherent natures of products.

In connection with the above question, it might further be pointed out that the words "dangerous," or "unreasonably dangerous," must in part be interpreted with reference to the particular sort of damage involved, at least if damages other than those for personal injury are to be allowed. It would be difficult, for example, to imagine a much more innocuous article than the concrete block involved in the *Spence* case,¹²⁹ if "dangerous" is used in its primary sense. But if the term be defined in such a case as including danger of harm to the plaintiff's property or to surrounding property, the test remains of value. Perhaps, then, it would not be amiss to frame the proposition in terms of "an article dangerous, or unreasonably dangerous, to the plaintiff's person or property."

V. DEFENSES

A. *The Disclaimer*

No less interesting and significant than the fact that these cases have abandoned the privity requirement is the fact that four of them have struck a blow at that last-ditch defense of the manufacturer, the disclaimer clause. The ramifications of this are rather important, for as the status of the disclaimer turns, so in great measure will turn the whole question of strict liability, at least if it is to be imposed through the medium of an implied warranty. Privity requirement or not, so long as liability can be disclaimed or limited by means of a clause in the sales contract, it remains within the power of the manufacturer to reduce strict liability to a nullity.¹³⁰

126. RESTATEMENT (SECOND), TORTS § 402 A (tentative draft, April 7, 1961).

127. *Ibid.*

128. For a discussion of this factor, see Dickerson, *The Basis of Strict Products Liability*, 1962 INS. L.J. 7, 9.

129. *Spence v. Three Rivers Builders & Masonry Supply*, *supra* note 94.

130. This sword may sometimes prove double-edged. If a manufacturer, insulated by one or more distributors, is to directly disclaim his liability to the consumer he must in some way do so in the final sales contract between the

Long plagued by this thorn, many courts have advanced the rule that disclaimers of warranty are to be strictly interpreted, and construed against the disclaiming party.¹³¹ The maxim has often led to some close reasoning, but has served its purpose, and any disclaimer not drafted with extreme care is quite likely to be valueless as far as a warranty implied by law is concerned. This was the approach adopted by the court in the *Jarnot* case.¹³²

The disclaimer, immediately following the standard automobile ninety day, 4,000 mile warranty, read as follows:

This warranty shall be limited to shipment to the purchaser without charge except for transportation, of the part or parts intended to replace those acknowledged by the Ford Motor Company to be defective.¹³³

In circumventing this phraseology, the court stated:

[T]he warranty applies exclusively to the replacement of a defective part, and it has no bearing on the question of the liability of Ford Motor Company where the failure of a defective part results in damages covered by another and distinct implied warranty of merchantability and fitness for the intended use.¹³⁴

The court then distinguished cases wherein the written warranty had been accepted in lieu of all other warranties "express or implied," apparently reasoning that the omission of those words in the present disclaimer vitiated it as to a warranty implied by law. The result, of course, was obviously contrary to the manufacturer's actual intentions, but then the rule of strict construction was formulated to accomplish just that.

A more carefully drafted disclaimer was presented in the *Dodson* case,¹³⁵ but the Tennessee Court of Appeals completely overlooked it. How this could happen when in setting out the facts the disclaimer was reiterated in full, is unknown, but happen it did. The same disclaimer was before the New Jersey court in *Hen-*

distributor and the ultimate purchaser. By thus drawing reference to himself the way may be left open for a court to seize upon the disclaimer as demonstrative of the fact that privity does exist. See *General Motors Corp. v. Dodson*, *supra* note 100, at 661. In view of the fact that the disclaimer is still operative, however, perhaps the loss of the privity issue is of small moment to the manufacturer.

131. *VOLD, SALES* 445 (2d ed. 1959).

132. *Jarnot v. Ford Motor Co.*, *supra* note 121.

133. *Id.* at 428, 156 A.2d at 571.

134. *Ibid.*

135. *General Motors Corp. v. Dodson*, *supra* note 100, at 660-61. The warranty and disclaimer read:

The Manufacturer warrants each new motor vehicle . . . to be free from defects and workmanship under normal use and service, its obligation under this Warranty being limited to making good at its factory any part or parts thereof of which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4000 miles . . . be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been defective; *this warranty being expressly in lieu of all other warranties express or implied, and all other obligations or liabilities on its part . . .* (Emphasis added.)

ningsen,¹³⁶ however, and Judge Francis' solution there more than makes up for *Dodson's* oversight, it being in fact no less noteworthy than his attack upon the privity requirement. The approach utilized was a dual one. Upon a careful analysis of the facts it was decided in part that inasmuch as the particular clause was never read by Mr. Henningsen nor brought to his attention, but rather was tucked away in small print among several other unlabeled clauses, he should not be bound by it. There is, however, nothing particularly unusual in this approach,¹³⁷ and it is the second line of reasoning which is of most interest here. After noting that the policy behind the implied warranty is the protection of the consumer and that this particular disclaimer was standardized among automotive manufacturers, the court had this to say:

The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) *arrived at freely by parties of relatively equal bargaining strength*. The lawmakers did not authorize the automotive manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect had no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case . . . we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to require an adjudication of its invalidity.¹³⁸

Here, then, was a court willing to attack a disclaimer at least partially on public policy grounds. The idea was not completely new; as a matter of fact a New Jersey court only a few years previously had utilized the same theory in a case involving a disclaimer of negligence.¹³⁹ But it is significant that the court in *Henningsen*, instead of relying solely upon the narrow determination that the disclaimer was deceptively obtained, turned to a public policy argument to express its disapproval of any attempt to frustrate strict liability. The importance of such a holding is made evident by the fact that when the same disclaimer arose in the *Anderson-Weber* case a year later the Iowa Supreme Court, in striking it down, relied entirely upon the public policy language in *Henningsen*.¹⁴⁰

This poses an interesting problem. To what extent has *Henningsen* solved the

136. *Henningsen v. Bloomfield Motors*, *supra* note 101, at 367, 161 A.2d at 74.

137. For other cases using it, see *Weedworth v. Rice Bros. Co.*, 110 Misc. 158, 179 N.Y. Supp. 722 (Sup. Ct. 1920), *aff'd*, 193 App. Div. 971, 184 N.Y. Supp. 958 (1920); *Black v. B. B. Kirkland Seed Co.*, 158 S.C. 112, 155 S.E. 268 (1930).

138. *Henningsen v. Bloomfield Motors*, *supra* note 101, at 404, 161 A.2d at 95. (Emphasis added.)

139. *Kuzmiak v. Brookchester Inc.*, 33 N.J. Super. 575, 111 A.2d 425 (App. Div. 1955).

140. *State Farm Mut. Auto. Ins. Co. v. Anderson Weber*, *supra* note 121.

problem of the disclaimer? As far as the standardized guaranty and disclaimer in the automotive industry is concerned, of course, there is little question but that Judge Francis did indeed strike a mortal blow. But beyond this factual situation, to what extent will *Henningsen's* public policy argument prove effective?

The court's reasoning, it will be noted, was based in great measure upon the fact that Mr. Henningsen in reality had little freedom of contract. Had he wished to purchase any other type of American automobile he would have found the same disclaimer. It was upon this foundation that the court superimposed the question of public policy. As a practical matter this situation is to be found throughout great expanses of our economy, for in buying many types of products the consumer does indeed enter an area wherein he will find little if any essential difference between the disclaimers imposed by various manufacturers of the same product. With a great many producers, moreover, this may be a situation impossible to change. Obviously, any differences in disclaimers would have to be substantial to satisfy a court bent upon a search for real freedom of contract, and the highly competitive nature of a particular industry might well preclude the inception of any such differences. Even a wholesale relaxation of the disclaimer by all members of the industry would probably be ineffective. It was the lack of freedom of choice which motivated the court in *Henningsen*, far more than the fact that the written warranty gave little. Whether the disclaimers are limited or unlimited, so long as there is no real freedom of choice between them the problem remains the same, and insofar as they attempt to cut short the relief which would be accorded but for their presence a court following *Henningsen* may be expected to vitiate them.¹⁴¹

Beyond this point, however, the rationale of the *Henningsen* case will not carry. This of course still leaves the sticky problem of a disclaimer which the purchaser, knowing of the matter and freely contracting, actually chooses to accept. In such a case the public interest in protecting the consumer runs headlong into the sacrosanct principle that the law should not interfere with contracts freely made. How a court will approach a problem of this sort is difficult to say, although there are several possibilities. It is arguable that the effect of such a disclaimer should be limited to the purchaser, and should not prejudice the rights of those third parties who have had no relationship with the contract.¹⁴² Should this seem anomalous in view of the attack upon privity, it must be remembered that theoretically the *liability* is imposed solely as a matter of law, and has nothing to do with a contract, while the disclaimer most certainly is a matter of contract. This argument of course still leaves the disclaimer in effect as to the purchaser. To eliminate the difficulty in both areas a court might advance entirely on public

141. In connection with this problem it is interesting to note the action taken by the automotive manufacturers following the *Henningsen* case. Instead of in some way acting as to the disclaimer itself, the written warranty was simply extended to a length of one year or 12,000 miles. As one writer has said with reference to this, "[U]nder the old warranty the buyer received nothing. Under the new he receives three times nothing." Note, 36 NOTRE DAME LAW. 233, 237 (1961).

142. 2 HARPER & JAMES, TORTS 1589-90 (1956).

policy grounds,¹⁴³ and depending upon the weight accorded to the public interest in defect-free products such an approach may be forecast. Obviously, however, the problems of the disclaimer clause are not yet over.

B. *Contributory Negligence and Assumption of Risk*

Should contributory negligence on the part of the injured party be a defense to the type of liability discussed in this comment? The question was squarely raised by two of the recent non-food cases, and to determine the existence of any limitations in the area a discussion of this factor seems in order.

One of the cases above referred to was *Jarnot*.¹⁴⁴ It was there held that such a defense was inapplicable, but the future usefulness of the decision is questionable. The court reasoned that the action was upon the contract, and inasmuch as contributory negligence had never been a defense to an action sounding in contract it should fail here also.¹⁴⁵ There can be no quarrel with such a holding, of course, if the court actually wishes to consider the liability as contractual. But in the type of case considered in this comment the first hurdle to be cleared is that of the privity requirement, and adoption of the idea that the liability is contractual is the weakest possible approach to that problem. Indeed, such reasoning on the part of plaintiff's counsel might well amount to digging one's own grave, for there are doubtless few courts which would feel themselves free to do away with privity if they are confined to holding that the action really is upon the contract. As previously indicated, there is substantial authority for the proposition that the action may sound in tort,¹⁴⁶ and for any court bent upon abandoning the privity requirement this would be the preferable view.

As far as warranty cases generally are concerned the question is subject to dispute, at least upon its face. Several courts have indicated that contributory negligence should be available as a defense,¹⁴⁷ while others have taken a diametrically opposed stand.¹⁴⁸ As Prosser has noted, however, much of the apparent conflict disappears when the factual situations in the cases are consulted, rather

143. *Linn v. Radio Center Delicatessen*, 169 Misc. 879, 9 N.Y.S.2d 110 (Munic. Ct. N.Y. 1939), is a case which might support this proposition. It should be noted, however, that the court there also relied in part upon the theory that agreement to the disclaimer was deceptively obtained.

144. *Jarnot v. Ford Motor Co.*, *supra* note 121.

145. The court qualified this by stating that "damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation." *Id.* at 431, 156 A.2d at 573. This, of course, is the contracts rule of avoidable damages. Under the facts of the case it was held inapplicable.

146. For older cases see *Farrel v. Manhattan Market Co.*, 198 Mass. 271, 274 (1908), and cases cited therein. For a more modern case so stating, see *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

147. *E.g.*, *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955); *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 58 So. 2d 71 (1952); *Fredendall v. Abraham & Straus*, 279 N.Y. 146, 18 N.E.2d 11 (1938).

148. *E.g.*, *Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254 (6th Cir. 1960) (express warranty); *Simmons v. Wichita Coca Cola Bottling Co.*, 181 Kan. 35, 309 P.2d 633 (1957) (implied warranty); *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939) (express warranty).

than the language used.¹⁴⁹ Many, if not most, of those cases which have declared contributory negligence to be a defense have in actuality involved conduct more closely analagous to assumption of a known risk, rather than a simple failure to exercise due care.¹⁵⁰ The most reasonable solution to the problem, then, might be to lay aside completely any talk of "contributory negligence," and to work instead with the principles of assumption of risk.

Still another solution was offered by a federal district court for Hawaii in the *Chapman* case.¹⁵¹ It was there claimed that the wearing of the defective article, a flammable (unknown to the plaintiff) hula skirt, to a dance at which there was cigarette smoking constituted contributory negligence as a matter of law. In answer to this the court said:

It seems to the court, however, that, contributory negligence, which takes no account of the comparative negligence of the parties, often produces results far from equitable, and for that reason is not likely to be adopted by the Hawaii courts in its full strictness, if at all, as a complete defense in cases such as this based on breach of implied warranty, unless the contributory negligence practically amounts to an assumption of risk. . . .

On the other hand, it is reasonable to believe that the courts of Hawaii would follow the rule that the plaintiff's contributory negligence may be taken into consideration by the jury in fixing the amount of damages in a breach of implied warranty case. Defense counsel . . . did not ask for a rule of comparative negligence or permitting the jury to consider the alleged contributory negligence in mitigation of damages.¹⁵²

Such an approach has much to commend it, but difficulties are still present. To speak in terms of "contributory negligence" or even "comparative negligence" when the liability was never based on negligence to begin with is to incur a difficult problem of semantics, undoubtedly misleading to a jury. In this respect it would seem advisable that any reference to negligence at all should be discouraged; more than enough confusion has arisen as to this in the past. There may be, however, something to be said for the basic idea involved. There is no need to mention the word "negligence;" it would be enough simply to instruct the jury that in assessing the damages they might consider the plaintiff's lack of care, in comparison to that which would have been exercised by a reasonable person under similar circumstances. This of course would not constitute a bar to the plaintiff's action, that function being left to the defense of assumption of risk. It is true that such an idea, at least in the negligence field, is of relatively recent birth and that

149. Prosser, *The Assault*, *supra* note 122, at 1147-48.

150. See, e.g., *Nelson v. Anderson*, *supra* note 147, in which the plaintiff continued to use an oil burner after noticing that it was smoking. For further examples, see Prosser, *The Assault*, *supra* note 122, at 1147, n.288. But see 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* 372-73 (1960), pointing out that not all the cases can be reconciled on this basis, and arguing that a distinction should be drawn between express warranties and implied warranties, contributory negligence to be available as a defense in the latter case but not in the former.

151. *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961).

152. *Id.* at 85-86.

many courts might be hesitant in adopting it. But if it is ever to make its appearance perhaps no better place for it could be found than in such a relatively virgin area as this.

VI. STRICT LIABILITY V. THE IMPLIED WARRANTY

Having dealt now with various questions designed to bring into focus the outlines of that type of strict liability to be found in the privity-free implied warranty, there yet remains perhaps the most obvious question of all. Should the language of implied warranty be dropped completely, and strict liability simply be imposed as such?

Prosser, long a leader in the field, has argued strenuously that it should be so, and in support thereof has pointed out several troublesome factors in the area of warranty law.¹⁵³ Thus it is said, among other things, that the warranty's preoccupation with contractual principles long has and may be expected to continue to create confusion; that the codification of the law of warranty by both the *Uniform Sales Act* and the *Uniform Commercial Code* may prove to be a stumbling block to any growth in the area;¹⁵⁴ that in its technicalities the sales warranty is an ill-adapted vehicle for imposing strict liability, providing as it does several needless traps for the unwary products liability litigant;¹⁵⁵ and finally, that by dispensing with warranty concepts some of the problems of the disclaimer may be eliminated.¹⁵⁶

All of this of course presumes that it is actually strict liability, *as such*, which we wish to apply in this area, and that the warranty is simply a tool found at least partially workable to that end. The presumption seems well founded however. One cannot read many of the modern cases without being impressed by the general idea that it *is* strict liability which is being promulgated; technical aspects of warranty notwithstanding. It is rare, for instance, to find any real distinction drawn between the implied warranties of merchantability and fitness,¹⁵⁷ or to see any individualized treatment of the reliance factor inherent in warranty concepts.¹⁵⁸ The impression is

153. Prosser, *The Assault*, *supra* note 122, at 1127-34.

154. It will be remembered that the *Uniform Sales Act* extends the implied warranty only from the seller to the buyer. The *Uniform Commercial Code*, however, has broadened this to include members of the buyer's immediate family and guests in the home, and further states that it does not intend to restrict the developing case law in the area. *Supra* note 112.

155. Particularly as to the requirement of notice of breach. See *UNIFORM SALES ACT* § 49.

156. This might or might not help solve the disclaimer problem. Even if liability is termed "strict," without reference to warranties, it is quite possible to consider a disclaimer as simply a contract limiting or excluding liability. The question, then, would probably still be one relating to public policy considerations. On the area generally, see 6 WILLISTON, *CONTRACTS* §§ 1751B-E (rev. ed. 1938).

157. "[T]he distinction between a warranty of fitness for a particular purpose and of merchantability is in many instances practically meaningless." *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 370, 161 A.2d 69, 76 (1960).

158. See, e.g., *UNIFORM SALES ACT* § 15(1).

Here again the distinction must be drawn between the cases discussed in this comment and those which find an express warranty in the plaintiff's reliance upon the defendant's advertising. For discussions of the latter type, see 1 FRUMER & FRIEDMAN, *op. cit. supra* note 150, § 16.04(4); Annot., 75 A.L.R.2d 112 (1961).

even further strengthened when one finds the applicable statutes, which would presumably prevent any relaxation of the privity rule as to some parties, being either intentionally circumvented or by-passed completely.¹⁵⁹ If all this is to be so, and it is strict liability which the courts are intending to impose, then a suggestion that we abandon the language of warranty seems sound.

This general idea has been given effect, at least as to food, in a newly proposed section of the *Restatement of Torts*.¹⁶⁰ Nowhere in that draft is the word "warranty" mentioned, it being simply stated that liability is to be incurred

even though (a) the seller has exercised all possible care in the preparation of the food, and (b) the consumer has not bought the food from or entered into any contractual relation with the seller.¹⁶¹

While one authority has criticized this phraseology by remarking that a simple omission of the word "warranty" does not make the obligation any less a warranty, and that courts may still be expected to do their own classifying,¹⁶² there is still a good deal to be said for the proposal. The theory, obviously, is to draw attention to the strict liability aspects of the area, and away from the aforementioned problems encountered when dealing with the sales law of warranties. There is of course nothing to prevent an adaptation or growth of the sales warranty which would adequately cover the area; the problem is simply how easily such an adaptation could be accomplished. It is true that the implied warranty has so far been made to serve the purpose, but often only by means of some rather violent twisting of the concepts on which it was founded. Why continue to twist it to fit an end for which it was never designed, when relief is at hand in the relatively simple and adaptable term "strict liability"? Such an approach would undoubtedly be the more honest one. As a general matter, moreover, it would seem important for a court to recognize clearly that it is strict liability with which it is dealing, for only by doing so can the real problems, some of which have been indicated in this comment, be adequately brought into focus. The confusion which inevitably arises in attempting to give effect to changing social desires while at the same time rendering lip service to legal theories never fashioned for such use, is apparent in several areas of our law.¹⁶³ Certainly, in a field so wide and important as that under consideration here, it would seem that such confusion should be avoided.

CONCLUSION

The future of the privity rule in the implied warranty area appears dim, at least as a long range proposition. In this respect, there is undoubtedly something of value to be gained in recalling the relaxation of the privity rule as applied to negligence liability. The attack which was taking place in that field some forty years

159. This point is noted and discussed at length in *Chapman v. Brown*, *supra* note 151, at 100-18.

160. *Supra* note 126.

161. *Ibid.*

162. Dickerson, *The Basis of Strict Products Liability*, 1962 *INS. L.J.* 7, 8.

163. Gregory, *Trespass to Negligence to Absolute Liability*, 37 *VA. L. REV.* 539 (1951).

ago is remarkably similar in pattern to that which is presently occurring as to warranty liability. The similarity, for instance, between the *MacPherson* case and the *Henningsen* case, and between what the former accomplished and what the latter has probably accomplished, is obvious. Presumably then, if the pattern continues, the passage of the next forty years will find implied warranty liability as unfettered by the requirements of privity as negligence liability is now.

Should this prove to be the case, the term "products liability" will become synonymous with "strict liability." Indeed, perhaps this is true in some jurisdictions even now. Exactly how strict the liability will prove to be, however, is a different matter. If the trend of the present cases and legal writing be followed, we would have, generally speaking, strict tort liability, without the necessity of pleading or proving negligence, but limited in its application by approximately the same tests as to zone of danger and causation as presently exist with respect to negligence liability. This, it should be noted, is not strict liability in the fullest sense of the term. A manufacturer would not be liable for every injury which as a matter of physics or psychology could be traced to his defective product, any more than his negligence liability is carried that far. It is of course quite possible that the liability to be eventually imposed may be more strict than that. The trend so far, however, seems to be in the direction indicated.

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